IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

THURSDAY, THE 21ST DECEMBER 2006 / 30TH AGRAHAYANA 1928

Crl.Rev.Pet.No. 4298 of 2006()

CRA.701/2004 of III ADDL. SESSIONS COURT (ADHOC) FAST TRACK I, THRISSUR
ST.40/2004 of ADDITIONAL MUNSIFF AND JUDL. MAGISTRATE OF FIRST CLASS COURT, IRINJALAKUDA

REVN. PETITIONER: APPELLANT/ACCUSED:

GEORGE, S/O.CHANAYIL ANTONY,
MANATTUKUNNU DESOM, ALOOR VILLAGE,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT.

BY ADV. SRI.A.C.DEVY

RESPONDENTS: COMPLAINANT/STATE:
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1. KAMARUDHEEN,
S/O.MANAKULANGARAPARAMBIL SHAIK MOHAMMED,
MANATTUKUNNU DESOM, ALOOR VILLAGE,
MUKUNDAPURAM TALUK, THRISSUR DISTRICT.

2. THE STATE OF KERALA REPRESENTED BY
THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI-31.

GOVT. PLEADER SRI.KAMMAPPU

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 7/12/2006, THE COURT ON 21/12/2006 PASSED THE FOLLOWING:

K.T. SANKARAN, J.

CRL.R.P.NO. 4298 OF 2006

Dated this the 21st day of December,2006

O R D E R

The trial court found the petitioner – accused guilty of the offence punishable under Section 138 of the Negotiable Instruments Act. He was sentenced to undergo simple imprisonment for three months. The accused was also directed to pay a compensation of Rs.75,000/- to the first respondent – complainant under Section 357(3) of the Code of Criminal Procedure and in default of payment of compensation, to undergo rigorous imprisonment for ten days. The petitioner – accused challenged the conviction and sentence in appeal. The Appellate Court dismissed the appeal and confirmed the conviction and sentence.

2. The case of the first respondent – complainant is that the accused borrowed an amount

of Rs.75,000/- on 10.5.1999 and in discharge of that debt/liability, the accused issued Ext.P1 cheque dated 14.8.1999. On presentation of the cheque, it was dishonoured on the ground of insufficiency of funds in the account maintained by the accused. Ext.P4 notice dated 6.12.1999 was issued, which was received by the accused on 7.12.1999. The accused did not repay the amount nor did he send any reply to the notice. The complaint was filed by the first respondent within the time prescribed under Section 142 of the Negotiable Instruments Act.

3. The complainant was examined as PW1. There was no defence evidence on the side of the accused. The case put forward by the accused in the cross examination of PW1 is that the cheque was issued to one Assanar and it was misused by the complainant. In the cross examination of PW1, he stated that the issue of Ext.P1 cheque and the payment of money

were simultaneously made. PW1 stated that at first the accused handed over the cheque and thereafter, a sum of Rs.75,000/- was given by the complainant to the accused. It was contended by the accused that since the cheque was issued before the amount was given by the complainant to the accused, it cannot be said that the cheque was issued in discharge of any debt or liability coming within the purview of Section 138 of the Act. The trial court negatived this contention. It was also held by the trial court that the presumption under Section 139 of the Negotiable Instruments Act was not rebutted by the accused. The Appellate Court confirmed the findings of the trial court.

4. The learned counsel for the petitioner submitted that as it was admitted by the complainant when examined as PW1 that the cheque was issued prior in point of time of lending of money, no offence under Section 138 of the

Negotiable Instruments Act is made out. He also submitted that the courts below were not justified in drawing the presumption under Section 139 and in holding that the presumption is not rebutted. The counsel also submitted that at any rate, the sentence awarded is excessive.

5. To appreciate the contentions put forward by the learned counsel for the accused that no offence is made out, it is relevant to advert to Sections 5, 6, 43, 118 and 138 of the Negotiable Instruments Act and Section 2 of the Indian Contract Act. Section 6 defines the "cheque" thus:

> "6. "Cheque":- A "cheque" is a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.
>
> ....
> ...."

Section 5 defines "Bill of exchange" thus:

> "5. "Bill of exchange":- A "bill of exchange" is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument.
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> A promise or order to pay is not "conditional", within the meaning of this section and section 4, by reason of the time for payment of the amount or any instalment thereof being expressed to be on the lapse of a certain period after the occurrence of a specified event which, according to the ordinary expectation of mankind, is certain to happen, although the time of its happening may be uncertain.
>
> ....
> ...."

Section 43 of the Negotiable Instruments Act reads thus:

> "**43. Negotiable instrument made, etc., without consideration:**- A negotiable instrument made, drawn, accepted, indorsed, or transferred without consideration, or for a consideration which fails, creates no obligation of payment between the parties to the

> transaction. But if any such party has transferred the instrument with or without endorsement to a holder for consideration, such holder, and every subsequent holder deriving title from him, may recover the amount due on such instrument from the transferor for consideration or any prior party thereto.
>
> Exception 1:- ......
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> Exception 2:- No party to the instrument who has induced any other party to make, draw, accept, indorse or transfer the same to him for a consideration which he has failed to pay or perform in full shall recover thereon an amount exceeding the value of the consideration (if any) which he has actually paid or performed."

Section 118 of the Negotiable Instruments Act provides that until the contrary is proved, a presumption shall be made that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration.

6. The process of lending money and repayment of the same by issue of a cheque, either bearing the same date or a post-date, could be simultaneously made. When a person agrees to pay a sum and the borrower agrees to repay the same on a future date, there is consideration for the transaction. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. When a person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise. When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise. Every promise and every set of

promises, forming the consideration for each other, are called reciprocal promises. An agreement enforceable by law is a contract. These provisions are contained in Section 2 of the Indian Contract Act. When a person makes a proposal that he would issue a cheque if the other party lends money to him and if the latter accepts the proposal and lends money to the former, the same constitutes reciprocal promise and acceptance thereof. Even if the borrower hands over the cheque just before lending the money, it cannot be said that the transaction of lending money and agreeing to repay is not legal or complete. If the cheque is issued in anticipation of lending money, as part of the same transaction, and if the money is not given to the borrower who issued the cheque, the consideration fails and Section 43 of the Negotiable Instruments Act would come into play. At the same time, after issuing the cheque by the borrower to the lender and as part of the

reciprocal promise the lender pays money, it cannot be said that there is a failure of consideration. In such cases, the cheque issued by the borrower could very well be said to be issued in discharge of a debt or liability, provided money is paid by the lender to the borrower. There may be several types of transactions where cheques are issued in anticipation of supply of goods or in anticipation of doing something which forms part of reciprocal promises. For eg., if a lawyer issues a cheque to the publisher of law books in anticipation of despatch of law books to the lawyer as promised, the moment the law books are received by the lawyer, there is consideration for the issue of the cheque. If, after the issue of such cheque, the publisher of the law books does not keep up his promise, there is a failure of consideration and the cheque could not be said to be issued in discharge of a debt or liability coming within the purview of Section 138 of the Negotiable

Instruments Act. If a person says to the other "I will issue a post-dated cheque to you if you lend money to me", and if that proposal is accepted by such other person and he lends money to the former, it can safely be said that the cheque was issued in discharge of a debt or liability, though the cheque was handed over prior in point of time of handing over the money. The presumption under Section 139 of the Negotiable Instruments Act is that the holder of the cheque received the cheque for the discharge of any debt or other liability. The presumption is not that the holder of the cheque received the cheque for incurring any debt or liability. The presumption under Section 138 casts the burden of proof of failure of consideration on the drawer of the cheque. In **I.C.D.S. Ltd.** v. **Beena Shabeer** (2002 (3) KLT 218 (SC)), the Supreme Court held that the language of the statute, namely, the Negotiable Instruments Act, depicts the intent of the law-makers to the effect that

wherever there is a default on the part of one in favour of another and in the event a cheque is issued in discharge of any debt or other liability, there cannot be any restriction or embargo in the matter of application of the provisions of Section 138 of the Act.

7. For the aforesaid reasons, I am not inclined to accept the contention of the learned counsel for the petitioner that the cheque in question was not issued in discharge of a debt or liability. It has come out in evidence that money was paid to the accused. The courts below found that the accused received the amount from the complainant. The findings of the courts below that the accused received the amount and that Ext.P1 cheque was issued by him in discharge of the debt/liability, are legal and proper. The courts below were right in holding that presumption under Section 139 of the Negotiable Instruments Act could

be drawn in the facts and circumstances of the case and in the light of the admitted and proved facts and that the accused failed to rebut the presumption. No grounds are made out for interference in Revision in the matter of conviction.

8. As regards sentence, I am of the view that a substantive sentence of imprisonment till the rising of the Court would be a sufficient sentence to meet the ends of justice, in the light of the decision in **Anil Kumar** v. **Shammy** (2002 (3) KLT 852), particularly in view of the fact that adequate compensation has been awarded under Section 357(3) of the Code of Criminal Procedure.

9. In the result, the conviction is confirmed. However, the sentence of imprisonment is reduced to imprisonment till the rising of the Court. The learned counsel for the petitioner submitted that a reasonable time may be granted to the petitioner to

pay the compensation amount. In the facts and circumstances of the case, three months' time is granted to the petitioner to pay the compensation amount. Execution of the default sentence in respect of the compensation amount shall be kept in abeyance for a period of three months.

The Criminal Revision Petition is allowed in part as indicated above.

(K.T.SANKARAN)
Judge

ahz/

K.T.SANKARAN, J.

CRL.M.C.NO. OF

O R D E R

September, 2006